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TOM AZZARELLO,

No. C-08-2371 MMC

Plaintiff,

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS FOR LACK OF
PERSONAL JURISDICTION**10
11 v.

12 NAVAGILITY, LLC,

13 Defendant.
14 _____ /15 Before the Court is defendant Navagility, LLC's ("Navagility") "Motion to Dismiss for
16 Lack of Personal Jurisdiction and Improper Venue," filed May 30, 2008. Plaintiff Tom
17 Azzarello ("Azzarello) has filed opposition, to which Navagility has replied.¹ On
18 September 4, 2008, the Court deemed the matter suitable for decision on the papers. (See
19 Order filed September 4, 2008.) Having read and considered the papers filed in support of
20 and in opposition to the motion, the Court rules as follows.**BACKGROUND²**21
22 Navagility is a limited liability company organized under the laws of New York and
23 with its principal place of business in Poughkeepsie, New York. (See DiMarco Decl. ¶ 2.)
24 Anthony M. DiMarco ("DiMarco"), a New York resident, is its founder, President, and
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¹In connection with its reply, Navagility filed a Supplemental Declaration of Anthony
M. DiMarco, to which Azzarello has filed an Objection, on the ground said declaration
introduces new facts and gives rise to new legal issues to which Azzarello did not have an
opportunity to respond in his opposition. The Objection is hereby sustained.²The following facts are not in dispute.

1 Managing Member. (See id.) Navagility has no employees, business facilities, or offices
2 in California. (See id. ¶¶ 3, 5.) Navagility is not registered to do business in California,
3 has no corporate filings with the Secretary of State of California, and does not file tax
4 returns in California. (See id. ¶ 3.)

5 Azzarello is a resident of California. (See Azzarello Decl. ¶ 7.) In December 2004
6 Azzarello invested \$50,000 in Navagility, (see id. ¶ 8), by which he obtained a 1.41%
7 ownership of its equity, (see DiMarco Decl. ¶ 4). Of the thirty-three other equity investors,
8 thirty-two are citizens of New York, and one is a citizen of New Jersey. (See id.)

9 On April 4, 2007, DiMarco sent by email a bridge loan offer to investors, including
10 Azzarello.³ (See Azzarello Decl., Ex. B). The email sought \$300,000 in bridge loans to
11 support Navagility's "career management business" and its "emerging social network
12 business" until future revenue could be obtained, and solicited investments from existing
13 investors in increments of \$25,000. (See *id.*) The loans were to be repaid on October 13,
14 2007 in a "single balloon payment" equivalent to two times the principal investment. (See
15 *id.*) The email was not addressed directly to Azzarello; rather, it was addressed to DiMarco
16 himself and blind carbon copied to existing investors in the company, including Azzarello.
17 (See *id.*) After reading the offer, Azzarello consulted his brother who was living in New
18 York and working as Navagility's "Chief Experience Officer." (See Azzarello Decl. ¶¶ 9,
19 19.) Azzarello's brother assured him, by phone, that the offer was legitimate. (See *id.*) On
20 April 5, 2007, Azzarello signed a Letter of Acceptance and sent a check for \$100,000 to
21 Navagility in New York. (See *id.* ¶ 21.) On April 9, 2007, DiMarco sent Azzarello an email
22 thanking him for the check and stating DiMarco was adding a clause to the agreement,
23 providing options if repayment was made late. (See *id.* ¶ 23.) Azzarello did not expressly
24 consent to these terms but rather emailed his brother to inquire about them. (See *id.* ¶ 24.)
25 Azzarello's brother assured him that Navagility intended to meet their end of the
26 agreement. (See *id.* ¶ 25.) As of October 2007, Navagility had not repaid Azzarello. (See

²⁸ ³A “bridge loan” constitutes “interim financing for an individual or business until the permanent or the next stage of financing can be obtained.” (See Opp’n at 3:27- 4:2.)

1 id. ¶ 29.) The parties thereafter exchanged four emails regarding the delay, which
2 Navagility attributed to a lack of funds. (See id. ¶¶ 29-32.) On May 9, 2008 Azzarello filed
3 the instant complaint.

LEGAL STANDARD

5 A plaintiff bears the burden of establishing personal jurisdiction. See Rio Props., Inc.
6 v. Rio Int'l Interlink, 284 F.3d 1007, 1019 (9th Cir. 2002). Consequently, when a defendant
7 moves to dismiss for lack of personal jurisdiction, the plaintiff is “obligated to come forward
8 with facts, by affidavit or otherwise, supporting [such] jurisdiction.” See Amba Mktg. Sys. v.
9 Jobar Int'l, 551 F.2d 784, 787 (9th Cir. 1977). Where the motion will be decided on the
10 parties’ respective written submissions, the plaintiff need only make a *prima facie* showing
11 that personal jurisdiction exists; in that regard, the court accepts as true the uncontested
12 allegations in the complaint and resolves any factual disputes in the plaintiff’s favor. See
13 Boschetto v. Hansing, 539 F.3d 1011, 1015 (9th Cir. 2008).

14 Where, as here, no federal statute governs personal jurisdiction, the district court
15 applies the law of the forum state. See id. Because California's long-arm statute permits
16 courts to exercise personal jurisdiction to the extent permitted by the Due Process Clause,
17 personal jurisdiction in the instant action is proper if the requirements of due process are
18 met. See Core-Vent Corp. v. Nobel Industries AB, 11 F.3d 1482, 1485-86 (9th Cir. 1993).
19 Due process requires that the defendant have "certain minimum contacts with [the forum
20 state] such that the maintenance of the suit does not offend 'traditional notions of fair play
21 and substantial justice.'" Id. at 1485 (quoting International Shoe Co. v. Washington, 3256
22 U.S. 310 316 (1945)).

DISCUSSION

24 || A. General Jurisdiction

25 A court's exercise of personal jurisdiction may be based on either general jurisdiction
26 or specific jurisdiction. See Panavision Int'l., L.P. v. Toeppen, 141 F.3d 1316, 1320 (9th
27 Cir. 1998). General jurisdiction exists where "a defendant is domiciled in the forum state or
28 his activities there are 'substantial' or 'continuous and systematic.'" See id. "Longevity,

1 continuity, volume, economic impact, physical presence, and integration into the state's
 2 regulatory or economic markets are among the indicia of such a presence." Tuazon v. R.J.
 3 Reynolds Tobacco Co., 433 F.3d 1163, 1172 (9th Cir. 2006). Azzarello asserts Navagility
 4 is subject to general jurisdiction. The record before the Court reflects, however, that
 5 Navagility has no offices, facilities or employees outside of New York, its investors are, with
 6 minor exception, all citizens of New York, and its contacts with California are of a limited
 7 nature. Under such circumstances, Azzarello has failed to make a prima facie showing that
 8 Navagility is subject to general jurisdiction in California.

9 **B. Specific Jurisdiction**

10 Specific jurisdiction over a nonresident defendant is appropriate when a three-part
 11 test is satisfied:

12 (1) The non-resident defendant must purposefully direct his activities or
 13 consummate some transaction with the forum or resident thereof; or perform
 14 some act by which he purposefully avails himself of the privilege of conducting
 15 activities in the forum, thereby invoking the benefits and protections of its laws;
 (2) the claim must be one which arises out of or relates to the defendant's forum-
 related activities; and (3) the exercise of jurisdiction must comport with fair play
 and substantial justice, i.e. it must be reasonable.

16 Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1205-06
 17 (9th Cir. 2006). The plaintiff bears the burden on the first two prongs. See
 18 Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004). If the plaintiff
 19 meets that burden, the defendant must come forward with a "compelling case" that the
 20 exercise of jurisdiction would not be reasonable. See id.

21 In applying the above test to contract actions, the court ordinarily looks to whether
 22 the defendant purposefully availed itself of the privilege of conducting activities in the forum
 23 state. See, e.g., Sher v. Johnson, 911 F.2d 1357, 1362 (9th Cir. 1990). "Purposeful
 24 availment" requires that the defendant have performed some type of affirmative conduct
 25 which allows or promotes the transaction of business within the forum state." Id. (internal
 26 quotation and citation omitted). Parties who are domiciled outside the forum state who
 27 "reach out beyond one state and create continuing relationships and obligations with
 28 citizens of another state" are subject to jurisdiction in the forum state. See Burger King

1 Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985).

2 In the instant case, Azzarello, relying on Burger King, argues that he has met his
 3 burden as to the first prong of the above-described test because Navagility “reached out to
 4 [him] through e-mail, knowing he lived in California, both to invest and to borrow money.”
 5 (See Opp’n at 1:6-8.) As discussed below, Azzarello’s argument is not persuasive.

6 At the outset, the Court notes, and Azzarello’s argument implicitly acknowledges, the
 7 formation of a contract with a citizen of the forum state will not, by itself, support the
 8 exercise of personal jurisdiction over a nonresident defendant. See Burger King at 478.
 9 The additional circumstances identified by Azzarello, however, whether viewed separately
 10 or in combination, do not suffice to establish the requisite minimum contacts.

11 First, although the solicitation of a contract is relevant to the jurisdictional analysis,
 12 Burger King requires more than such “reaching out.” See Burger King at 479 (finding
 13 jurisdiction where defendant not only “reached out” to plaintiff in forum state, but did so for
 14 purposes of negotiating contract that “had a *substantial* connection with that State”) (internal
 15 quotation and citation omitted) (emphasis in original)); see also Roth v. Garcia
 16 Marquez, 942 F.2d 617, 621 (9th Cir. 1991) (noting “[i]t is important to distinguish contract
 17 from tort actions,” in which, by contrast, courts are “allowed the exercise of personal
 18 jurisdiction over a defendant whose only ‘contact’ with the forum state is the ‘purposeful
 19 direction’ of a *foreign* act having *effect* in the forum state”) (internal quotation and citation
 20 omitted) (emphasis in original)).

21 Nor does the addition of Navagility’s use of email to communicate with Azzarello in
 22 California alter the equation. See Peterson v. Kennedy, 771, F.2d 1244, 1262 (9th Cir.
 23 1985) (holding “ordinarily use of the mails, telephone, or other international
 24 communications simply do not qualify as purposeful activity invoking the benefits and
 25 protection of the [forum] state” (internal quotation and citation omitted) (alteration in
 26 original)). Similarly, knowledge that a party to a transaction resides in the forum state fails
 27 to establish the necessary minimum contacts. See Boschetto, 535 F.3d at 1014, 1018
 28 (finding no jurisdiction in buyer’s home state despite nonresident seller’s knowledge of

1 buyer's location).

2 Rather, it is the "prior negotiations and contemplated future consequences, along
 3 with the terms of the contract and the parties' actual course of dealing" that "determin[e]
 4 whether the defendant purposefully established minimum contacts with the forum." See
Burger King, 471 U.S. at 479. As the Supreme Court has observed, "the future
 5 consequences . . . themselves are the real object of the business transaction." See id.
 6 (internal quotation and citation omitted); see also Roth, 942 F.2d at 622 (holding "*future*
 7 consequences of [] contract" to make film based on defendant's novel, e.g., editing,
 8 production work and advertising in forum state, tipped otherwise "close call" in favor of
 9 finding purposeful availment) (*emphasis in original*)); Sher, 911 F.2d at 1362 (holding
 10 purposeful availment requires conduct that "allows or promotes the transaction of business
 11 within the forum state") (internal quotation and citation omitted) (*emphasis added*).
 12

13 Here, in contrast to those cases in which personal jurisdiction has been found, the
 14 contract at issue envisioned no ongoing relationship or consequences in California. See,
 15 e.g., Burger King, 471 U.S. at 479 (finding jurisdiction where parties entered into "long-term
 16 franchise" agreement providing for "20-year relationship that envisioned continuing and
 17 wide-reaching contacts . . . in [forum state]"); Sher, 911 F.2d at 1363 (finding jurisdiction
 18 where Florida law partnership required California client to execute deed of trust to California
 19 real estate, thus "looking to the laws of California to secure its right to payment under its
 20 contract").

21 Rather, the bridge loan transaction constituted a discrete encounter; the agreement
 22 was signed by Azzarello on April 5, 2007 and repayment was to be made by a "single
 23 balloon payment" on October 13, 2007. The contract creating the loan contemplated no
 24 further action by either party after the repayment date. Put another way, the instant
 25 contract was a "one-shot affair." See Boschetto, 535 F.3d at 1017 (adopting district court's
 26 characterization of contract; noting sale of car on eBay created no ongoing obligations in
 27 buyer's state); see also Roth, 942 F.2d at 622 ("This was not an instance where the
 28 contract was a one-shot deal that was merely negotiated and signed by one party in the

1 forum."). Nor did Azzarello's California location have any bearing on the terms or execution
2 of the agreement. The purpose of the transaction was to obtain short-term financing for the
3 operations of a company that is based in and operates out of New York. Other than the
4 mailing of Azzarello's check, no performance in California was contemplated. Cf. Roth, 942
5 F.2d at 622 (finding jurisdiction where performance of contract was to take place primarily
6 in forum); Sher, 911 F.2d at 1363 (basing finding of jurisdiction on execution of deed to
7 California real estate).

8 To the extent Azzarello relies on the parties prior dealings in connection with
9 Azzarello's role as an investor in Navagility, such reliance is unavailing, as such dealings
10 are not relevant to the instant analysis. “[I]n a breach of contract case, it is only the
11 ‘dealings *between the parties in regard to the disputed contract*’ that are relevant to the
12 minimum contacts analysis.” See RAR, Inc. v. Turner Diesel, Ltd., 107 F.3d 1272, 1278
13 (7th Cir. 1997) (quoting Vetrotex Certainteed Corp. v. Consol. Fiber Glass Prods. Co., 75
14 F.3d 147, 153 (3d Cir. 1996) (emphasis in original)). As Azzarello himself concedes, “This
15 lawsuit does not have to do with the investment. It is a simple claim, based on a loan that
16 Navagility failed to repay.” (See Opp'n at 3: 24-26.)

17 In sum, Azzarello's showing is legally insufficient to enable this Court to exercise
18 personal jurisdiction over Navagility.

19 CONCLUSION

20 For the reasons stated above, Navagility's motion to dismiss for lack of personal
21 jurisdiction is hereby GRANTED and the instant action against Navagility is hereby
22 DISMISSED.

23 **IT IS SO ORDERED.**

24 Dated: October 16, 2008

25 
26 MAXINE M. CHESNEY
27 United States District Judge
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